

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HIGHLAND PARK POLICEMEN & FIREMEN  
RETIREMENT SYSTEM,

UNPUBLISHED  
June 22, 2006

Plaintiff/Counterdefendant-  
Appellee,

and

HIGHLAND PARK RETIRED POLICE &  
FIREMEN ASSOCIATION,

Intervening Plaintiff,

and

CHARLES HARPER,

Intervening Plaintiff-Appellant,

v

No. 252424  
Wayne Circuit Court  
LC No. 02-242359-CZ

CITY OF HIGHLAND PARK, HIGHLAND  
PARK FINANCE DIRECTOR, HIGHLAND  
PARK TREASURER, HIGHLAND PARK CITY  
CLERK and HIGHLAND PARK CITY  
COUNSEL,

Defendants-Appellees,

and

HIGHLAND PARK EMERGENCY FINANCIAL  
MANAGER,

Defendant/Counterplaintiff-  
Appellee.

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Before: White, P.J., and Jansen and Wilder, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that the circuit correctly determined that the loan agreement is enforceable.

I dissent from the majority's conclusion that the circuit court correctly determined that the promissory note was unambiguous, and that the grant of summary disposition to defendants was therefore proper. Intervening-plaintiff asserts that the promissory note's silence on the question whether the benefits level reached at the conclusion of the eight-year term would be rolled back to the rate in effect at the beginning of the agreement, or whether it would be the rate at which benefits were permanently frozen, renders the note capable of conflicting interpretations, and it was thus ambiguous on that point. Intervening-plaintiff asserts that MCL 38.556d, of the Fire Fighters and Police Officers Retirement Act and parol evidence of the parties' intent, including the parties' conduct, statements of its representatives, and past practice all indicate that the parties intended the benefit level existing on July 1, 2004 to be the benefit level at which benefits were frozen.

A contract is ambiguous if it is susceptible of two or more reasonable interpretations. *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). The promissory note at issue, which defendant City and the Board of plaintiff Retirement System entered into in 1994, states in pertinent part:

FOR VALUE RECEIVED, THE CITY OF HIGHLAND PARK, a municipal corporation (hereinafter called "Maker"), Promises to pay to the order of the BOARD OF TRUSTEES OF THE POLICE AND FIRE DEPARTMENT OF THE CITY OF HIGHLAND PARK, (hereinafter called "Lender"), . . . the Principal sum of \$1,103,000.00 dollars (hereinafter referred to as the ("Loan")), together without interest.

This Note shall be paid as follows:

Payments shall be made of at least \$17,300 per month. The first payment shall be due 30 Days after Council approves. The term of this Note shall be 5 years. Interest is not to be calculated.

\* \* \*

In lieu of the fact that the Maker of this loan has not fulfilled its agreement to pay the proposed interest rate of 6% over 5 years on the outstanding loan to the retirement system, the Holder requires the Maker to grant the Police and Fire Retirement System a 2% increase in pension benefits for 8 years based upon the pension payroll, in which such period will begin July 1, 1996.

This promissory note is contingent on the City agreeing to pay a 2% increase to the retirees benefit for 8 years and will not take effect until this provision providing for a 2% increase in pension benefits is granted by the Maker.

This Note shall be governed by and construed in accordance with the laws of the State of Michigan.

MCL 38.556d is part of the Fire Fighters and Police Officers Retirement Act, MCL 38.551 *et seq.* It provides in pertinent part:

A municipality, by ordinance **or in another manner provided by law**, may adopt from time to time benefit programs providing for postretirement adjustments increasing retirement benefits. **Such benefit programs may provide for 1-time postretirement percentage increases in retirement benefits; lump sum postretirement distributions; or any other method considered appropriate by the municipality. The retirement benefit payable after making an adjustment pursuant to the benefit program adopted shall be the new retirement benefit payable until the next adjustment, if any, is made.** [Emphasis added.]

The promissory note makes no reference to benefit levels before or after the specified eight-year duration. The circuit court concluded that the agreement was “in the nature of bonuses” for the retirees—percentage increases for eight years that they otherwise would not have received. The problem is that implicit in the circuit court’s ruling that benefit levels would revert to the pre-escalated retirement benefit levels is a particular interpretation of the parties’ intent, when the agreement says nothing regarding the parties’ intent.

The question whether the benefit levels revert to the 1996 level or remain at the level reached at the end of the eight-year period is not answerable by reading the promissory note alone. Either conclusion is reasonable. If the provision regarding the 2% increases is read as providing for a bonus in lieu of interest, as the circuit court interpreted it, then one might assume that the base amount would revert back. But if the provision is read in accordance with its terms as requiring that defendant City grant the retirement system a 2% increase in pension benefits, which it did by resolution of the City Council, then one would assume that as pension benefits subject to the statute, and consistent with the parties’ prior practice and agreement,<sup>1</sup> the benefits

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<sup>1</sup> In 1986, after defendant City had eliminated the existing police and fire departments, the parties entered into an agreement. That agreement provided:

AGREEMENT

\* \* \*

WHEREAS the CITY has experienced, is experiencing and may in the foreseeable future experience financial difficulty in paying vested contributions to the aforesaid retirement system for ultimate distribution to the aforesaid RETIRANTS, and whereas there is currently pending litigation, the outcome of which may adversely affect RETIRANTS or the CITY or both and whereas the

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CITY and the RETIRANTS desire to reach an amicable agreement respecting the payment by the CITY of the aforesaid contributions:

WHEREAS the CITY has reorganized the furnishing of police and fire services within the CITY by establishing a Public Safety Department staffed by Public Safety Officers which require qualifications, training, and job duties substantially different and distinct from those required by police or firefighter and which has eliminated the Police and Fire Departments; and

WHEREAS questions exist, whether the compensation for the rank held by a RETIRANT at the time of his employment by the CITY as a policeman or fieman is related to job duties or compensation of a public safety officer for purposes of pension escalation as set forth in the pension system:

NOW THEREFORE in consideration of their mutual agreements, the parties agree as follows:

- (1) The CITY will pay to the aforesaid retirement system for ultimate distribution by THE BOARD to the undersigned RETIRANTS, a one time only sign-up bonus of eight percent (8%) of the gross annual current pension benefits, said amount to be paid in lump sum on or about July 1, 1986.
- (2). The CITY will pay the aforesaid retirement system, for ultimate distribution by THE BOARD to the undersigned RETIRANTS, a twelve percent (12%) increase in RETIRANTS gross annual current pension benefits, said increase to become effective and to be paid beginning July 1, 1986.
- (3) The CITY will pay to the aforesaid retirement system, for ultimate distribution by THE BOARD to the undersigned RETIRANTS, an additional two percent (2%) increase in RETIRANTS gross annual current pension benefits, said increase to become effective and to be paid on July 1, 1987, the CITY will thereafter pay, as herein provided, an additional two percent (2%) increase in the undersigned RETIRANTS pension benefits each year thereafter on each successive July first for the succeeding eight (8) years up to and including the year beginning on July 1, 1995 at which time increases in contributions to said retirement system by the CITY shall forever cease;
- (4) That the increases in pension benefits herein provided are in lieu of provisions and terms for increases currently provided in the Highland Park Policemen and Firemen system and are also in lieu of any other provisions for increases provided by law and any

(continued...)

would, after eight years, be frozen at the new level. I would thus reverse the circuit court's determination that the agreement is unambiguous and remand for review of the parol evidence on the issue.

Intervening-plaintiff also challenges the circuit court's denial of his motion to intervene and his motion for class certification. The court so ruled because at the time the motion was brought, the case was over, given the court's decision. Because I would reverse the grant of summary disposition to defendants, I would vacate the circuit court's order denying intervening-plaintiff's motions, and direct the court to reconsider the motions on remand.

/s/ Helene N. White

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(...continued)

other provisions made for increase, or to be made, in any form whatsoever;

(5) RETIRANTS hereby expressly waive any and all past, present and future increases in benefits from said retirement system whatsoever, except increases expressly provided for in this agreement;

(6) As used in paragraph two (2) above, the term "current pension benefits" means the gross annual pension benefits being paid to RETIRANTS by said retirement system on January 31, 1986;

(7) As used in paragraph three (3) above, "current pension benefits" means the gross annual pension benefits being paid to RETIRANTS by said retirement systems on January 31, 1987, as adjusted by the two percent (2%) increases as provided for herein; it being the intent of the parties hereto that the two percent (2%) annual increases shall be compounded;

(8) RETIRANTS hereby expressly save and hold harmless the CITY and THE BOARD, from any other requirements, however made, to make or pay any increase to said retirement system or RETIRANTS, whatsoever, except as expressly provided in this agreement;

(9) This agreement shall be governed by the law of the State of Michigan and any suit for any breach of this agreement shall be instituted only in the Circuit Court of Wayne County, Michigan.